No. 93-724

Supreme Court, U.S.
FILED
DEC 9 1993
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

SHARON FRATT KELLY, *et al.*,

*Petitioners,*

—v.—

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

Christopher T. Dunn
*(Counsel of Record)*
Marcia Robinson Lowry
Children's Rights Project
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elizabeth S. Symonds
American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Arthur B. Spitzer
ACLU of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

BEST AVAILABLE COPY

54pp

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded, in a class action alleging that executive-branch officials of the District of Columbia engaged in a pattern and practice of violations of federal and District of Columbia law in the operation of the District's foster-care system, that a district court need not abstain from adjudicating federal claims that there was no opportunity to litigate in District of Columbia proceedings in which only some of petitioners were involved.

2. Whether the court of appeals correctly relied on local law in affirming a district court's judgment that was based on local and federal law.

## TABLE OF CONTENTS


*Page*

TABLE OF AUTHORITIES ..... iii

STATUTORY PROVISIONS INVOLVED ..... 1

COUNTERSTATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 3

INTRODUCTION ..... 4

REASONS FOR DENYING THE WRIT ..... 11

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT SHOULD NOT HAVE ABSTAINED FROM ADJUDICATING RESPONDENTS' FEDERAL CLAIMS ..... 11

II. THE COURT OF APPEALS CORRECTLY RELIED ON PETITIONERS' VIOLATIONS OF LOCAL LAW ... 17

CONCLUSION ..... 19

APPENDIX ..... 1a

CHILD ABUSE PREVENTION AND TREATMENT ACT
(Relevant excerpts) ..... 1a

ADOPTION ASSISTANCE AND CHILD WELFARE ACT of 1980
(Relevant Excerpts) ..... 2a

*Page*

THE DISTRICT OF COLUMBIA PREVENTION OF CHILD ABUSE AND NEGLECT ACT OF 1977 . . . . . 12a

THE DISTRICT OF COLUMBIA YOUTH RESIDENTIAL FACILITIES LICENSURE ACT OF 1986 (Relevant Excerpts) . . . . . 20a

## TABLE OF AUTHORITIES

*Page*

**Cases**

*Ankenbrandt v. Richards*,
504 U.S. __, 112 S.Ct. 2206 (1992) . . . . . 12, 18

*Ashwander v. TVA*,
297 U.S. 288 (1936) . . . . . 18

*Brown v. Trustees of Boston University*,
891 F.2d 337 (1st Cir. 1989) . . . . . 19

*Colorado River Water Conservation District v. United States*,
424 U.S. 800 (1976) . . . . . 12

*District of Columbia Court of Appeals v. Feldman*,
460 U.S. 462 (1983) . . . . . 16

*Huffman v. Pursue, Ltd.*,
420 U.S. 592 (1974) . . . . . 13

*Joseph A. ex rel. Wolfe v. New Mexico Department of Human Services*,
575 F.Supp. 346 (D.N.M. 1983) . . . . . 15

*Juidice v. Vail*,
430 U.S. 327 (1977) . . . . . 13

*Middlesex Ethic Committee v. Garden State Bar Association*,
457 U.S. 423 (1982) . . . . . 13

*Moore v. Sims*,
442 U.S. 415 (1979) . . . . . 12, 15, 16

*Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,
477 U.S. 619 (1986) . . . . . 13

*Page*

*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ..... 18

*Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) ..... 13

*Timmy S. v. Stumbo*, 537 F.Supp. 39 (E.D.Ky. 1981) ..... 15

*Trainor v. Hernandez*, 431 U.S. 434 (1977) ..... 13

*Turner v. District of Columbia*, 532 A.2d 662 (D.C. App. 1987) ..... 19

*United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1986) ..... 17, 18

*Wilder v. Bernstein*, 645 F.Supp. 1292 (S.D.N.Y. 1986), *aff'd on other grounds*, 848 F.2d 1338 (2d Cir. 1988) ..... 15

*Winston v. Children and Youth Services*, 948 F.2d 1380 (3d Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2303 (1992) ..... 15

*Younger v. Harris*, 401 U.S. 37 (1971) ..... 3, 11, 12, 13, 14

**Statutes, Rules and Regulations**

42 U.S.C. §§620-628 ..... 5

42 U.S.C. §627(a)(2)(B) ..... 6

42 U.S.C. §627(a)(2)(C) ..... 6

42 U.S.C. §§670-679a ..... 5

42 U.S.C. §671(a)(10) ..... 6

*Page*

42 U.S.C. §671(a)(16) . . . . . 6
42 U.S.C. §675(1) . . . . . 6
42 U.S.C. §675(5) . . . . . 6
42 U.S.C. §5116 . . . . . 5
42 U.S.C. §§5101-5106a . . . . . 5
42 U.S.C. §5106a . . . . . 5
42 U.S.C. §5106a(b)(2) . . . . . 5
D.C. Code Ann. §§2-1351 to 2-1357 . . . . . 5
D.C. Code Ann. §§3-801 to 3-808 . . . . . 5
D.C. Code Ann. §3-802 . . . . . 6, 17
D.C. Code Ann. §3-803 . . . . . 6
D.C. Code Ann. §3-805 . . . . . 6, 17
D.C. Code Ann. §§6-2101 to 6-2107 . . . . . 5
D.C. Code Ann. §6-2102(b) . . . . . 6, 17
D.C. Code Ann. §6-2107(b) . . . . . 6, 17
D.C. Code Ann. §6-2123 . . . . . 17
D.C. Code Ann. §6-2123(a) . . . . . 17
D.C. Code Ann. §6-2123(a)(3) . . . . . 17
D.C. Code Ann. §6-2123(b)(1-2) . . . . . 6
D.C. Code Ann. §6-2123(b)(1, 3) . . . . . 6
D.C. Code Ann. §16-2323(a) . . . . . 6, 17
D.C. Code Ann. §6-2105 . . . . . 17
D.C. Code Ann. §6-2111 . . . . . 17
D.C. Code Ann. §§6-2111 to 6-2119 . . . . . 5

*Page*

D.C. Code Ann. §§6-2121 to 6-2127 . . . . . 5
D.C. Code Ann. §6-2122 . . . . . 17
D.C. Code Ann. §6-2122(c) . . . . . 6
D.C. Code Ann. §6-2122(d) . . . . . 6
D.C. Code Ann. §6-2124 . . . . . 17
D.C. Code Ann. §§16-2301 to 16-2338 . . . . . 5
D.C. Code Ann. §§16-2351 to 16-2365 . . . . . 5
Sup.Ct.R. 10.1(c) . . . . . 16

## STATUTORY PROVISIONS INVOLVED

In addition to the District of Columbia statutes cited by petitioners, this case involves the federal Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974), as amended by Pub. L. No. 100-294, 102 Stat. 102 (1988)(codified as amended in relevant part at 42 U.S.C. §5106a); and the federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§620-628, 670-679a).[1] This case also involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

## COUNTERSTATEMENT OF THE CASE

Contrary to petitioners' repeated assertions, this is not a child-custody case, nor does it involve any questions concerning adjudications whether a child should be removed from the custody of his or her parents or whether parental rights should be terminated so that a child may be adopted. Nor is this a case in which a federal court has been asked to second-guess discretionary decisionmaking in individual cases.

Rather, this is a case in which a class of several thousand children alleged -- and a district court found after a full trial on the merits -- that executive-branch officials of the District of Columbia operate a child-welfare system that systematically deprives respondent children of their rights under federal statutory law, the United States Constitution, and statutory law of the Dis-

[1] Respondents have set out the relevant text of these statutes in their appendix.

trict of Columbia.[2] This is no more a child-custody case than a case challenging the conditions of confinement of the mentally incompetent is a challenge to an individual competency proceeding or than a case challenging the conditions of a prison facility is a challenge to an individual finding of guilt.

In this case the district court, relying on more than one thousand admissions by petitioners -- various executive-branch officials of the District of Columbia -- and two weeks of uncontroverted expert testimony adduced by respondents, concluded that petitioners had engaged in a persistent and pervasive course of unlawful conduct that irreparably harmed respondent children. In a comprehensive and detailed opinion, the district court held that petitioners had violated respondents' rights under federal and local law and entered judgment against petitioners. *See LaShawn A. ex rel. Moore v. Kelly*, 762 F.Supp. 959 (D.D.C. 1991).

Petitioners appealed the district court's liability judgment[3] to the United States Court of Appeals for the District of Columbia Circuit, arguing that the district court should have abstained from adjudicating the federal claims and that the district court erred in construing

---

[2] As the court of appeals explained, "[T]he district court found that the District of Columbia Department of Human Services ("DHS"), the agency entrusted with the care of foster children and abused and neglected children, has consistently evaded numerous responsibilities placed on it by local and federal statutes . . . [and] as to the children already enmeshed in the foster-care system, that the practices of DHS deprived them of their due process rights under the Fifth Amendment to the United States Constitution." *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1321 (D.C.Cir. 1993).

[3] The parties separately negotiated a remedial order obligating petitioners to reform the District's foster-care system. That remedial order, which the District is now implementing, is not at issue in this appeal, but it contains a provision under which petitioners reserved their right to appeal the liability judgment only.

respondents' federal rights. A unanimous panel of the court of appeals rejected petitioners' abstention argument and affirmed the district court's liability order by relying on petitioners' violations of District of Columbia law. *See LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C.Cir. 1993).

Petitioners next moved for a rehearing by the panel or for a rehearing *en banc* by the court of appeals. The court denied these motions, *see* Pet.App. at 95-97, and petitioners filed this petition for a writ of *certiorari* with this Court.

## SUMMARY OF ARGUMENT

Petitioners assert that the court of appeals erroneously concluded that the district court appropriately adjudicated respondents' constitutional claims;[4] according to petitioners, the district court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Alternatively, petitioners contend that the court of appeals erred in relying solely on petitioners' violations of local law in affirming the district court's liability judgment. Both of these contentions are meritless, and neither presents an issue that justifies the granting of a writ of *certiorari*.

Petitioners' abstention argument is predicated upon their characterization of this case as a challenge to child-custody decisions that are the subject of ongoing District of Columbia proceedings. As noted above, however, this case does not involve any such challenge; instead, it seeks to remedy a pattern and practice of executive-branch violations of federal and District of Columbia law, and this Court has never suggested that a district

---

[4] Petitioners apparently do not argue to this Court that the district court should have abstained from adjudicating respondents' federal statutory claims. *See infra* note 11.

court should consider abstaining from adjudicating this type of suit. Moreover, the court of appeals expressly determined that there were no ongoing judicial proceedings in the District of Columbia in which respondents could have litigated their federal claims. This precludes abstention, even if this were the type of case in which abstention might be considered.

Petitioners' attack on the court of appeals' reliance on local law to affirm the district court's liability judgment is equally baseless. In relying solely on local law -- and thus avoiding unnecessary rulings on federal law -- the court of appeals was simply complying with rulings of this Court. As for petitioners' argument that the District of Columbia law upon which the court of appeals relied does not afford respondents a private cause of action, petitioners have waived this defense and are precluded from raising it now because they failed to present it either to the district court or to the court of appeals, having raised it for the first time in their motion to the court of appeals for a rehearing *en banc*. And, even if they had not waived the defense, petitioners' argument is groundless, as the court of appeals correctly relied upon a decision from the highest court of the District of Columbia that expressly held that children have a private cause of action under the District of Columbia statute at issue in this case.

Finally, beyond the meritlessness of petitioners' arguments, neither of their objections justify the granting of a writ of *certiorari*. The lower courts uniformly have rejected the abstention argument urged by petitioners, and the court of appeals' rulings are completely consistent with the decisions of this Court.

## INTRODUCTION

Foster care is a government system -- funded by local and federal funds -- established to care for children who cannot be cared for by their own parents. Given

the governmental role in foster care, respondent children -- who comprise a class of all children in the foster-care custody of the District of Columbia and all children known to the District as the result of a report of suspected abuse or neglect[5] -- have a panoply of legal rights under the laws of the United States and of the District of Columbia and under the United States Constitution.

Rather than challenge child-custody determinations or other related decisions committed to the discretion of the District of Columbia and its courts, it was these statutory and constitutional rights that respondents alleged petitioners had violated. Specifically, respondent children alleged petitioners operated a foster-care system that violated the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal Child Abuse Prevention and Treatment Act,[6] the District of Columbia Prevention of Child Abuse and Neglect Act of 1977,[7] the District of Columbia Youth Residential Facilities Licensure Act,[8] and the federal Adoption Assistance and Child Welfare Act of 1980.[9]

Under these mandates, the District of Columbia is required, for instance, to

> -- initiate investigations into reports of suspected abuse and neglect promptly and to take appropriate steps to protect children who are the subject of such reports, 42 U.S.C. §5106a(b)(2); D.C. Code Ann. §6-

---

[5] *See* 762 F.Supp. at 994 n.28 (class definition).

[6] Codified as amended at 42 U.S.C. §§5101-5106a, 5116.

[7] Codified as amended at D.C. Code Ann. §§2-1351 to 2-1357; 6-2101 to 6-2107; 6-2111 to 6-2119; 6-2121 to 6-2127; and 16-2301 to 16-2338, 16-2351 to 16-2365.

[8] Codified as amended at D.C. Code Ann. §§3-801 to 3-808.

[9] Codified as amended at 42 U.S.C. §§620-628, 670-679a.

2102(b);

-- assure that all children who enter foster care receive written case plans and periodic reviews of their cases, 42 U.S.C. §§627(a)(2)(B), 671(a)(16), 675(5); D.C. Code Ann. §§6-2107(b), 16-2323(a);

-- provide children with safe placements in which they will not be harmed and provide whatever services are necessary to assure that children in foster care are not harmed, U.S. Const., amend. V; D.C. Code Ann. §§3-802, 3-803, 3-805; 42 U.S.C. §671(a)(10);

-- provide services to families in an effort to return children home, when appropriate, 42 U.S.C. §627(a)(2)(C); D.C. Code Ann. §§6-2123(b)(1, 3), 6-2107(b);

-- provide services to those children who cannot return home so that they will be able to be adopted or placed in alternative permanent placements outside of government custody; 42 U.S.C. §§627(a)(2)(C), 675(1); D.C. Code Ann. §§6-2123(b)(1-2), 6-2107(b); and

-- have sufficient staff, supervisory personnel, and resources to comply with the mandates of District of Columbia law, D.C. Code Ann. §6-2122(c); and maintain staff qualifications, worker caseloads, and supervision requirements consistent with reasonable professional standards, *id.* §6-2122(d).

It is difficult to imagine a child-welfare system that is further from complying with these legal mandates than the District of Columbia's. On the basis of over one thousand formal admissions by petitioners, *see* 762 F.

Supp. at 964, and after a two-week trial at which respondents adduced uncontroverted statistical evidence and expert testimony about class-wide violations of respondents' rights and about the devastating consequences of those violations for these helpless children, district court judge Thomas F. Hogan held that petitioners' violations amounted to a "persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers," *id.* at 990 (quotations and citation omitted), and concluded that "the children in the District's foster care have been and continue to be irreparably harmed -- psychologically, emotionally, and sometimes physically -- by the inappropriate treatment they have received while in that care," *id.* at 986.

These findings were inevitable, given the evidence adduced at trial. For instance, named plaintiff LaShawn A. entered foster care when she was thirty months old after her mother placed her in District "emergency care." Though District law directs that emergency care is to last no longer than ninety days, LaShawn languished there for two and one-half years, during which time the District never developed any case plans for her and her case was never reviewed, in violation of federal and District of Columbia law. She was placed in a foster home in which she may have been sexually and physically abused, and she began to develop psychiatric problems. At trial, a psychiatric expert reported that, when he asked six-year-old LaShawn who hated her, she identified her foster mother and indicated that the woman beat her. When the doctor asked her who loved her, LaShawn replied, "no one." *Id.* at 983.

Named plaintiff Kevin E. experienced a similarly disturbing odyssey through the District's foster-care system. Kevin entered foster care as an infant and was still in government custody at the time of trial -- eleven years later. At the age of four, the District returned him to his mother, who had previously abused him, not in an ef-

fort to reunite them but simply because the District mistakenly had allowed its legal custody of Kevin to lapse. The District then failed to supervise the placement, and Kevin was abused by his mother again; he thus reentered foster care. Though the District had concluded soon after he had entered foster care as a baby that Kevin should be adopted, District officials never followed mandated procedures to make Kevin available for adoption, thus relegating him to long-term government custody. At the age of eight, after one failed suicide attempt, Kevin placed himself in a trash can and asked to be thrown away. *See id.* at 985.

Tragically, these stories are typical of what is happening to thousands of children in the District's foster-care program. For instance,

> -- For years, the Department failed to initiate and complete investigations in a timely manner, piling up backlogs of thousands of children known to be in potentially dangerous situations. 762 F.Supp. at 968-70;
>
> -- Nearly 75% of children in the District's emergency-care custody had been there more than 90 days -- the limit imposed by District law -- and members of the respondent class had languished there for as long as two years, with the result being "a state of limbo for these children who . . . do not have any case plans prepared on their behalf." *Id.* at 971;
>
> -- Of the children who were to be returned home -- the most common planning category -- 62% did not have and never had had a written case plan. *See id.* at 973. Of the children whom petitioners had consigned to permanent foster care -- a planning goal that District policy directs not be assigned to any

child younger than 12 -- 29% had been assigned that goal before they were one year old, and 48% had been assigned it before they were four. *Id.*;

-- Of the children in foster care, 42% had never had a medical examination since having entered the District's custody, and 79% had not had a dental examination. *Id.* at 974;

-- The Department routinely placed children in overcrowded foster homes, with approximately 40% of the District's foster homes having more children in them than their licenses permitted. Stipulated Findings of Fact 722-25, J.A. at 355.[10]

-- Although the shortage of adoptive and foster homes was widely recognized, the Department had assigned only one and a one-half workers to do all foster and adoptive home recruitment. 762 F.Supp. at 975-76. Not surprisingly, the district court found that petitioners "consistently failed to expedite the progression of children in its custody toward permanent placement through adoption." *Id.* at 975;

-- In the cases of more than one-half of the children in the District's foster-care custody, there was no evidence that they had ever been visited by their social worker. *Id.* at 974. In a related vein, 149 class members in the District's custody had no social worker at all. *Id.*;

---

[10] This citation is to the joint appendix submitted by the parties to the court of appeals.

-- Of the children for whom the District had determined that adoption was appropriate, only 29% had been referred to the adoption unit in a timely manner, and for 14% of the children it had taken over one year to complete this simple but necessary administrative step. Of the children who were legally freed for adoption but not placed in an adoptive home, only 24% had ever been referred for placement. *Id.* at 975. And the district court noted that "[t]he defendants have admitted that the[y] often fail[] to refer children for adoption even when all hope for family reunification is gone." *Id.* at 996;

-- While the national average stay in foster care is just over two years, children in the District's foster-care system remain there for an average of nearly five years. *Id.* at 968; and

-- At the time of trial, 107 of 239 authorized social worker positions within the District's child-welfare agency were vacant. This resulted in those workers on the job having to carry dangerously high caseloads, with one worker testifying that her caseload had *declined* to 69 families and 251 children. The court found that the agency "is unable to carry out its responsibilities under federal and District law while its social workers are operating at existing caseloads." *Id.* at 978.

In an attempt to deflect attention from these findings, petitioners repeat the same misleading assertion that they unsuccessfully proffered to the court of appeals and to the district court: that this case concerns issues of child custody, of whether children should be left at home or removed from their parents, and of whether parental rights should be terminated in individual cases so

that children can be legally freed for adoption. Respondents recognize that these are difficult, subjective decisions that should be left to the discretion of individual caseworkers in the District of Columbia and to its courts. In this case, however, respondents did not challenge the exercise of that discretion, and this appeal raises no questions concerning those issues.

Rather, this case is about the knowing and deliberate failure of high-level executive-branch officials to comply with clear legal mandates intended to protect the innocent victims of child abuse and neglect. Or, in the words of Judge Hogan, it is about

> the failures of an ineptly managed child welfare system, the indifference of the administration of the former mayor of the District of Columbia, Marion Barry, and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.

762 F.Supp. at 960.

## REASONS FOR DENYING THE WRIT

### I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT SHOULD NOT HAVE ABSTAINED FROM ADJUDICATING RESPONDENTS' FEDERAL CLAIMS

Petitioners assert that the rule first articulated in *Younger v. Harris* required the district court to abstain from adjudicating respondents' federal constitutional

claims. *See* Petition at 15-24.[11] This assertion evinces a fundamental misunderstanding of the *Younger* principle. Moreover, it cannot withstand the court of appeals' determination that there were no ongoing state judicial proceedings in which respondents could have litigated their federal claims.

As an initial matter, *Younger* abstention should not even be considered here because this case falls outside the substantive scope of the *Younger* doctrine. As this Court has explained, "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)(internal quotations omitted). "Abstention rarely should be invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Ankenbrandt v. Richards*, 504 U.S. ___, ___, 112 S.Ct. 2206, 2215 (1992) (quotations and citation omitted).

Consistent with this admonition, every case in which this Court has found *Younger* abstention to be appropriate has been limited to a situation in which the federal plaintiff was the subject of an ongoing or imminent state proceeding that the plaintiff sought to enjoin or preempt through a challenge in federal court to the constitutionality of some aspect of the state proceeding or state law. *See, e.g., Moore v. Sims*, 442 U.S. 415 (1979)(approving

---

[11] Petitioners limit their abstention argument to respondents' constitutional claims. To the extent this is a concession that no basis exists for the district court to have abstained from adjudicating respondents' federal statutory claims, this further undermines petitioners' abstention argument, for it would be wholly contrary to the purposes of abstention to have a federal district court split plaintiffs' federal claims into two cases by abstaining from adjudicating some federal claims while proceeding to address others.

abstention in case in which federal plaintiff sought to enjoin enforcement of Title 2 of the Texas Family Code through constitutional challenge to statute in federal court).[12] This limitation logically follows from the federalism policy consideration justifying *Younger* abstention: the importance of allowing state courts to move forward with their own proceedings and of respecting the role of state courts in construing state statutes that are the basis of ongoing or imminent judicial proceedings in which the constitutionality of the statutes could be challenged. *See id.* at 429.[13]

In this case, however, respondents did not seek to

---

[12] *Accord Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of Texas law concerning supersedeas bonds through constitutional challenge to statute in federal court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986)(approving abstention in case in which federal plaintiff sought to enjoin pending state proceedings through constitutional challenge to proceedings in federal court); *Middlesex Ethic Committee v. Garden State Bar Association*, 457 U.S. 423 (1982)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of New Jersey disciplinary rules through constitutional challenge to rules in federal court); *Trainor v. Hernandez*, 431 U.S. 434 (1977)(approving abstention in case in which federal plaintiff sought to enjoin enforcement of Illinois law governing attachment through constitutional challenge to statute in federal court); *Juidice v. Vail*, 430 U.S. 327 (1977)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of New York statutory contempt procedures through constitutional challenge to statute in federal court); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1974)(approving abstention in case in which federal plaintiff sought to enjoin enforcement of Ohio anti-nuisance statute through constitutional challenge to statute in federal court); *Younger v. Harris*, 402 U.S. 37 (approving abstention in case in which federal plaintiff sought to enjoin state enforcement of California criminal syndicalism statute through constitutional challenge to statute in federal court).

[13] The *Younger* doctrine may not even apply to the District of Columbia, as it is unclear whether the District of Columbia is a state for these purposes. *See, e.g.*, 990 F.2d at 1322.

enjoin or to interfere with any District of Columbia judicial proceeding, nor did they challenge the constitutionality of any District of Columbia statute. Rather, they sought injunctive relief against executive-branch officials to assure executive-branch compliance with statutory and constitutional obligations imposed upon these officials. To accept petitioners' suggestion that the *Younger* doctrine is even relevant in a case such as this would transform that narrow doctrine from one intended to protect the integrity of state judicial proceedings into a broad exhaustion requirement that would deprive plaintiffs of a federal forum to vindicate federal rights and that would immunize state executive-branch officials from scrutiny by the federal courts.

Even if this were the type of case in which abstention theoretically might be considered, it would be inappropriate in this case because there were no ongoing state proceedings in which respondents could have litigated their federal claims. Petitioners contend that respondents should have been required to bring this suit alleging systemic violations of federal and District of Columbia law and seeking injunctive relief against executive-branch officials of the District of Columbia as part of individual abuse and neglect proceedings in the Family Division of the Superior Court of the District of Columbia. *See* Petition at 25.

The court of appeals, however, closely examined this contention and found that a substantial portion of the class is not involved in any District of Columbia proceedings, that the Family Division proceedings in which some of the plaintiff class members are involved are extremely limited in scope and deal with issues wholly unrelated to the claims the children brought in federal court, and that the rules governing Family Division proceedings preclude class actions. *See* 990 F.2d at 1323. Most importantly, perhaps, the court of appeals pointed to two decisions in which District of Columbia courts

held that children in abuse-and-neglect proceedings could not litigate in those proceedings the types of claims at issue here. *See id.* Given this, the court of appeals concluded that "there was no pending judicial proceeding in the District of Columbia" in which respondents could have litigated their federal claims. *See id.* at 1323.

Petitioners do not even suggest that this conclusion -- or the court of appeals' description of Family Division proceedings -- is erroneous.[14] Because respondents had no opportunity to litigate their federal claims in the courts of the District of Columbia, no basis existed for the district court to have abstained from adjudicating those federal claims. *See Moore*, 442 U.S. at 425 ("The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings").

Finally, petitioners' abstention argument raises no question worthy of a writ of *certiorari*. The lower courts uniformly have ruled that children like respondents here may litigate in federal court the federal claims at issue in this case. *See Joseph A. ex rel. Wolfe v. New Mexico Department of Human Services*, 575 F.Supp. 346, 350 (D.N.M. 1983); *Wilder v. Bernstein*, 645 F.Supp. 1292, 1339 n.37 (S.D.N.Y. 1986), *aff'd on other grounds*, 848 F.2d 1338 (2d Cir. 1988); *see also Winston v. Children and Youth Services*, 948 F.2d 1380, 1385-86 (3d Cir. 1991)(rejecting abstention argument in individual case), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2303 (1992); *Timmy S. v. Stumbo*, 537 F.Supp. 39, 46 (E.D.Ky. 1981)(same).[15]

---

[14] Petitioners assert only that "the claims of the children who are parties to Family Division proceedings, even if constitutionally based, relate to core Family Division issues." Petition at 20.

[15] Petitioners' effort to demonstrate a conflict among the circuits, *see* Petition at 18-20, again relies upon the erroneous characterization of (continued...)

And nothing in *Moore v. Sims* suggests that the court of appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct. R. 10.1(c). In *Moore* -- as in every other *Younger* case decided by this Court -- federal plaintiffs sought to attack through a federal case state judicial proceedings in which they were involved and in which they could have litigated their federal claims. More specifically, in *Moore* the federal plaintiffs were parents who, in an effort to regain custody of their three children who were involved in Texas abuse-and-neglect proceedings, had filed a federal suit seeking to enjoin those proceedings through a constitutional challenge to the Texas statutes that authorized the proceedings. *See* 442 U.S. at 418-22. Finding that the parents could have litigated their constitutional claims through the ongoing state proceedings, this Court held that the district court should have abstained. *See id.* at 423-35.

*Moore* is clearly distinguishable from this case. Here, respondents do not challenge the constitutionality of any state statute nor do they seek to enjoin or to interfere with any ongoing or imminent state judicial proceeding. Moreover, the court of appeals expressly found that respondents had no opportunity to litigate their federal claims in the courts of the District of Columbia.[16]

---

[15] (...continued)
this case as one involving individual child-custody issues, which it is not.

[16] Similarly, the Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), has no bearing on this case. In relevant part, the Court noted in *Feldman* that a district court did not have the authority to review a judicial decision of the highest court of the District of Columbia, that authority having been vested exclusively in this Court. *See id.* at 476. In this case, respondents did not challenge in federal district court any ruling of the District of Columbia Court of Appeals nor of any other court of the District of Columbia.

(continued...)

## II. THE COURT OF APPEALS CORRECTLY RELIED ON PETITIONERS' VIOLATIONS OF LOCAL LAW

Petitioners next contend that the court of appeals erroneously relied on petitioners' violations[17] of District of Columbia law as a basis for affirming the district court's liability judgment. *See* Petition at 25-29.[18] According to petitioners, the court of appeals' reliance on local law "is a novel and startling principle of judicial decision-making." *Id.* at 26 n.15.

---

[16] (...continued)

In a related vein, petitioners' contention that the section of the remedial order that discusses "dispositional hearings" improperly provides for federal court supervision of District of Columbia courts, *see* Petition at 21, is groundless. The remedial order was negotiated by the parties and agreed to by petitioners; it is not at issue in this appeal. Moreover, the provision cited by petitioners imposes no obligation on the local courts and does not provide for district court oversight of those courts; its obligations run solely to petitioners.

[17] Petitioners' characterization of their violations of local law as "alleged," *see* Petition at 26, ignores the district court's numerous findings, which petitioners do not challenge, that petitioners in fact violated District of Columbia law. *See* 762 F.Supp. 959, 968-70 (protective services; citing D.C. Code Ann. §6-2102(b)); *id.* at 970-71 (preventive services; citing D.C. Code Ann. §§6-2105, 6-2124); *id.* at 971-72 (placements; citing D.C. Code Ann. §6-2123(a)); *id.* at 972-74 (case planning; citing D.C. Code Ann. §2107(b)); *id.* at 963, 974 (in-custody services; citing D.C. Code Ann. §§6-2107(b), 6-2123(a)(3), 6-2124); *id.* at 974 (periodic reviews; citing D.C. Code Ann. §16-2323(a)); *id.* at 974-75 (adoption services, citing D.C. Code Ann. §6-2123); *id.* at 964, 976 (information system; citing D.C. Code Ann. §6-2111); *id.* at 964, 977-79 (caseloads, staffing, supervision and training; citing D.C. Code Ann. §6-2122); *id.* at 979 (monitoring of placements; citing D.C. Code Ann. §§3-802, 3-805).

[18] To the extent petitioners intend to suggest that no basis exists for pendent jurisdiction, that suggestion is baseless. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 721-29 (1986). Moreover, petitioners never challenged the district court's authority to adjudicate the local claims and thus waived this defense.

Petitioners correctly note that the court of appeals, after having concluded that "[e]very claim supported by federal law is also supported by District law," 990 F.2d at 1324, affirmed the district court's liability order by relying solely on petitioners' violations of local law, *see id.* at 1324-26. Petitioners' suggestion, however, that the court of appeals erred in this approach is contrary to an express direction of this Court:

> This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. *The Court also has held that a federal court may resolve a case solely on the basis of a pendent state-law claim and that in fact the court usually should do so in order to avoid federal constitutional questions.*

*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984)(citing *Ashwander v. TVA*, 297 U.S. 288 (1936)(Brandeis, J., concurring); other citations omitted; emphasis added); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722 (1966)(stating that "where the federal question averred is not plainly lacking in substance, even though the federal ground be not established, [a federal court] may nevertheless retain and dispose of the case upon the non-federal ground"). The court of appeals did not err in relying on petitioners' violations of District of Columbia law to affirm the district court's liability judgment.[19]

---

[19] Petitioners' reliance on *Ankenbrandt v. Richards*, 112 S.Ct. 2206 (1992), is misplaced. In relevant part, the Court held in *Ankenbrandt* that federal diversity jurisdiction contains a "domestic relations exception" that encompasses "only cases involving the issuance of a divorce, alimony, or child-custody decree." *Id.* at 2215. This case involves none of these issues.

As for petitioners' contention that respondents have no cause of action under the relevant District of Columbia law, it is untimely and wrong. It was not until they filed a motion for rehearing *en banc* with the court of appeals that petitioners raised for the first time any question about respondents' local-law claims.[20] Petitioners' failure to present this issue to the district court or the court of appeals precludes petitioners from raising it at this stage of the proceedings. *See, e.g., Brown v. Trustees of Boston University*, 891 F.2d 337, 358-59 (1st Cir. 1989)(refusing to address appellee's challenge to district-court disposition of pendent state-law claim because appellee had failed to present issue to district court).

Finally, even if petitioners' had not waived this defense, their contention is baseless. In affirming the district court on local-law grounds, the court of appeals relied on a 1987 decision from the highest court of the District of Columbia that the unanimous panel found "conclusively settled" the issue of respondents' rights under local law. *See* 990 F.2d at 1324 (discussing *Turner v. District of Columbia*, 532 A.2d 662 (D.C. App. 1987)).

## CONCLUSION

This case presents no issues concerning comity, federalism, or the proper role of federal courts in overseeing state decisions concerning child-custody issues. Rather, the only question posed by this case is whether a

---

[20] Though respondents pleaded violations of District statutory law as a separate cause of action in their complaint and sought separate relief for those violations, petitioners never presented to the district court any issue about respondents' District-law claims. Similarly, after the district court found that petitioners had violated many provisions of District of Columbia law, petitioners failed to present any such issue to the panel of the court of appeals.

federal court can enjoin executive-branch officials from engaging in a willful and pervasive pattern and practice of violating federal and District of Columbia law in the operation of a foster-care system. The court of appeals correctly concluded that a federal court can enjoin such practices. Respondents therefore respectfully urge this Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

Christopher T. Dunn
(*Counsel of Record*)
Marcia Robinson Lowry
Children's Rights Project
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Elizabeth S. Symonds
American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Arthur B. Spitzer
ACLU of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

Dated: December 8, 1993

# APPENDIX

## CHILD ABUSE PREVENTION AND TREATMENT ACT
(Relevant excerpts)

### §5106a. Grants to States for child abuse and neglect prevention and treatment programs

(a) Development and operation grants

The Secretary, through the Center, is authorized to make grants to the States for purposes of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

(b) Eligibility requirements

In order for a State to qualify for a grant under subsection (a) of this section, such State shall --

(1) have in effect a State law relating to child abuse and neglect, including --

(A) provisions for the reporting of known and suspected instances of child abuse and neglect; and

(B) provisions for immunity from prosecution under State and local laws for persons who report instances of child abuse or neglect for circumstances arising from such reporting;

(2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect;

(3) demonstrate that there are in effect throughout the state, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such --

(A) administrative procedures;

(B) personnel trained in child abuse and neglect prevention and treatment;

(C) training procedures;

(D) institutional and other facilities (public and private); and

(E) such related multidisciplinary programs and services,

as may be necessary or appropriate to ensure that the State will deal effectively with child abuse and neglect cases in the State;

(c) ***
(d) ***

(e) Restrictions relating to child welfare services

Programs or projects relating to child abuse and neglect assisted under part B of title IV of the Social Security Act [42 U.S.C. 620 et seq.] shall comply with the requirements set forth in paragraphs (1)(A), (2), (4), (5), and (10) of subsection (b) of this section.

(f) ***

## ADOPTION ASSISTANCE AND CHILD WELFARE ACT of 1980
(Relevant Excerpts)

### §627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify

If, for any fiscal year after fiscal year 1979, there is appropriated under section 620 of this title a sum in excess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the

amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State --

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary --

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

(b) Reduction of allotment

If, for each of any two consecutive fiscal years after the fiscal year 1979, there is appropriated under section 620 of this title a sum equal to $325,000,000, each State's allotment amount for any fiscal year after such two consecutive fiscal years shall be reduced to an amount equal to its allotment amount for the fiscal year 1979, unless such State --

(1) has completed an inventory of the type specified

in subsection (a)(1) of this section;

(2) has implemented and is operating the program and systems specified in subsection (a)(2) of this section; and

(3) has implemented a preplacement preventive service program designed to help children remain with their families.

(c) ***

**§671. State plan for foster care and adoption assistance**

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which --

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration

of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2)(hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter (including activities under part F of this subchapter) or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, of services, directly to individuals on the basis of need, (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized

by law to conduct such audit or activity, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that the State agency will --

(A) report to an appropriate agency or official, known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under part B of this subchapter or this part under circumstances which indicate that the child's health or welfare is threatened thereby; and

(B) provide such information with respect to a situation described in subparagraph (A) as the State agency may have;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part

or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which

meets the requirements described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D of this subchapter, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

**§675. Definitions**

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title.

(B) A plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(C) To the extent available and accessible, the health and education records of the child, including --

(i) the names and addresses of the child's

health and educational providers;

(ii) the child's grade level performance;

(iii) the child's school record;

(iv) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;

(v) a record of the child's immunizations;

(vi) the child's known medical problems;

(vii) the child's medications; and

(viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

Where appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the nature and amount of any payments, services, and assistance to be provided under such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move

to another State while the agreement is effective.

(4) (A) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(B) In cases where --

(i) a child placed in a foster family home or child-care institution is the parent of a son or daughter who is in the same home or institution, and

(ii) payments described in subparagraph (A) are being made under this part with respect to such child,

the foster care maintenance payments made with respect to such child as otherwise determined under subparagraph (A) shall also include such amounts as may be necessary to cover the cost of the items described in that subparagraph with respect to such son or daughter.

(5) The term "case review system" means a procedure for assuring that --

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently that once every six months by either a court or by administrative review

(as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship,

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be place for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; and

(D) a child's health and education record (as described in paragraph (1)(A)) is reviewed and up-

dated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

## THE DISTRICT OF COLUMBIA PREVENTION OF CHILD ABUSE AND NEGLECT ACT OF 1977

### §6-2102. Handling of reports -- By Division

(a) ***

(b) The Division shall commence an investigation of all reports alleging neglect other than abuse within 24 hours of the receipt of the report except that when:

(1) A report alleges that a child is left alone or with inadequate supervision, the Division shall commence an investigation immediately. If the Division is unable to dispatch a worker to the child forthwith, it shall inform the police of the report;

(2) A report indicates the existence of an immediate danger to a child and the immediate removal of the child from his or her surroundings appears necessary despite the available resources, the Division shall inform the police of the contents of the report and request the police to investigate. The Division shall immediately commence a social investigation.

(c) ***

### §6-2107. Social investigation; services; report

(a) ***

(b) If there is a supported report, the agency responsible

for the social investigation shall as soon as possible prepare a plan for each child and family for whom services are required on more than an emergency basis and shall forthwith take such steps to ensure the protection of the child and the preservation, rehabilitation and, when appropriate, reunification of the family as may be necessary to achieve the purposes of this act. Such steps may include but need not be limited to: (1) Arranging for necessary protective, rehabilitative and financial services to be provided to the child and the child's family in a manner which maintains the child in his or her home; (2) referring the child and the child's family for placement in a family shelter or other appropriate facility; (3) securing services aimed at reuniting (with his or her family) a child taken into custody; (4) providing or making specific arrangements for the case management of each case when child protective services are required. To the maximum extent possible, the resources of the community (public and private) shall be utilized for the provision of services and case management.

(c) ***

**§6-2111. Establishment; purposes; staff**

(a) There is hereby established a Child Protection Register to be maintained by the Division.

(b) The purposes of the Register are to:

(1) Maintain a confidential index of cases of abused and neglected children;

(2) Assist in the identification and treatment of abused and neglected children and their families; and

(3) Serve as a resource for the evaluation, management, and planning of programs and services for abused and neglected children.

(c) The staff of the Department of Human Services as-

signed to maintain the Child Protection Register shall maintain 24-hour, 7 day-a-week telephone lines which may be combined with the 24-hour intake components described in subchapter III of this chapter.

(d) Said staff shall:

(1) Receive reports and information necessary for the operation of the Child Protection Register and make appropriate entries in such Register as required by §6-2112(a); and

(2) Release information contained in the Child Protection Register in a manner consistent with this act. (1973 Ed., §6-2111; Sept. 23, 1977, D.C. Law 2-22, title II, §201, 24 DCR 3341.)

**§6-2122. Organization**

(a) ***

(b) ***

(c) The Division shall have sufficient staff, supervisory personnel, and resources to accomplish the purposes of this act, including the capacity to provide emergency and continuing service resources to abused and neglected children and their families.

(d) Staff qualifications, caseload levels, and supervision requirements shall be guided by standards set by the Child Welfare League of America or other child welfare organizations, shall be published in the District of Columbia Register for public comments, and shall be reviewed by the mayor's Interagency interdepartmental Committee on Abuse and Neglect.

(e) ***

**§6-2123. Duties and responsibilities**

(a) The Chief of the Division shall have the following duties and responsibilities, any of which may be contract-

ed for with private or other public agencies:

(1) To receive and investigate reports of neglect as provided in §103 of this act, and §§6-2102 and 6-2104 and to assist in the determination of the need for the removal of an abused child as provided in §6-2105;

(2) Within 90 days of taking a child into custody pursuant to paragraph (1) of subsection (c) of §6-2124, to return the child to the home or to request the filing of a neglect petition in the Family Division of the Superior Court of the District of Columbia;

(3) To maintain a program of treatment and services for families of neglected and abused children;

(4) To prepare annually a plan for child protective services which shall be reviewed and commented on by the Mayor's Committee on Child Abuse and Neglect. The plan shall:

(A) Describe the division's implementation of this act, including its organization, staffing, method of operations and financing, and programs and procedures for the receipt, investigation and verification of reports;

(B) Describe the provisions for the determination of protective and the treatment of ameliorative service needs, and the provision of such services;

(C) State the guidelines for referrals to the Family Division of the Superior Court of the District of Columbia; and

(D) State the provisions for monitoring, evaluation and planning. The 1st plan shall be made available to the public within 90 days of September 23, 1977;

(5) To encourage and assist in the formation of child abuse/neglect teams in hospitals, health and mental health clinics and other appropriate facilities in the

District of Columbia; and

(6) To take whatever additional actions are necessary to accomplish the purposes of this act.

(b) The Director of the Department of Human Services, in addition to his or her other responsibilities, shall have the following duties and responsibilities, any of which may be contracted for with private or other public agencies:

(1) When a child has been adjudicated a neglected child and committed to the Department of Human Services, to offer rehabilitative services to the child's family;

(2) When rehabilitative services have failed to reunite a committed child and his or her family within a reasonable time, to prepare a permanent plan for the child;

(3) To establish or attempt to secure priority access for protective service clients, by contract or agreement with private organizations, other public agencies, or other Department of Human Services units, to services necessary for the preservation or reunification of families. These services may include but shall not be limited to:

(A) Emergency financial aid;

(B) Emergency caretakers;

(C) Homemakers;

(D) Family shelters;

(E) Emergency foster homes;

(F) Facilities providing medical, psychiatric or other therapeutic services;

(G) Day care;

(H) Parent aides/lay therapists;

(4) To monitor and evaluate services to and needs

of neglected children and their families;

(5) To compile and publish training materials and provide technical assistance on neglect prevention, identification and treatment; and

(6) To prepare and submit to the Mayor, the Council of the District of Columbia, and the public an annual report which shall include a description of the specific actions taken to implement this act and an evaluation of the Division's performance. The report shall include a full statistical analysis of case reports received, an evaluation of services offered, recommendations for additional legislation or services needed to fulfill the purposes of this act and the comments submitted by the Mayor's Interagency Interdepartmental Committee on Abuse and Neglect. The 1st report shall be submitted not later than 1 year and 90 days after September 23, 1977. (1973 Ed., §6-2133; Sept. 23, 1977, D.C. Law 2-22, title III, §303, 24 DCR 3341.)

**§6-2124. Services authorized; custodial placement; removal of child**

(a) When an investigation made pursuant to §§6-2102 and 6-2103 indicates that a child is an abused or neglected child and in need of services, the Chief of the Division is authorized to provide or secure any necessary services which may include:

(1) Emergency financial aid;

(2) Temporary 3rd-party placement with responsible neighbors or relatives for the child and his or her siblings: Provided, that the person with whom the child is placed shall not be considered an agent of the Department of Human Services;

(3) Emergency caretaker(s) who enter the home and provide temporary care for the child and his or her siblings in appropriate cases, when the consent of the par-

ent or other custodian cannot be obtained, notwithstanding the provisions of the Act of March 3, 1901, as amended (31 Stat. 1324);

(4) The placement of homemakers in the home to maintain the child and his or her siblings or to assist the parent or other caretaker in discharging his or her responsibilities to the child;

(5) Day care for the child and his or her siblings;

(6) Counselling services for the child and his or her family;

(7) Medical evaluation and/or emergency treatment of the child by a qualified physician; and

(8) Other appropriate services or resources available in the community.

(b) When an investigation indicates that a child has been left alone or with inadequate supervision and a 3rd-party placement cannot be made, the Division is authorized to make a temporary custodial placement of the child: Provided, that:

(1) Notice is left for the parent or custodian which shall state the procedure for reclaiming the child;

(2) Efforts continue to locate the parent;

(3) The child is returned forthwith upon the request of the parent or custodian, unless there is additional evidence of immediate danger to the child and police action is taken pursuant to §16-2309 (3) or 94); and

(4) A complaint alleging neglect is filed with the Superior Court of the District of Columbia:

(A) At the end of 5 days if the parent or custodian fails to claim the child within that time; or

(B) Immediately upon the discovery of additional evidence of immediate danger to the child.

(c) When an investigation made pursuant to §6-2102 or 6-2103 indicates that a child is an abused or a neglected child and when it has been determined that the child cannot be adequately protected by any of the services set forth in subsection (a) or (b) of this section or by any other services, the Chief of the Division is authorized to:

(1) Remove the child with the consent of the parent, guardian, or other person acting in loco parentis;

(2) Request the Corporation Counsel of the District of Columbia to petition the Family Division of the Superior Court of the District of Columbia for a finding of neglect and, where appropriate, the removal of the child; and

(3) Request the police to remove the child when the consent of a parent, guardian or other custodian cannot be obtained and the need to protect the child does not allow sufficient time to obtain a court order. (1973 Ed., §6-2134; Sept. 23, 1977, D.C. Law 2-22; title III, §304, 24 DCR 3341.)

**§16-2323. Review of dispositional orders**

(a) When a child has been adjudicated neglected and a dispositional order has been entered by the Division, the Division shall hold a review hearing.

(1) at least every six (6) months for a child under the age of six (6) years who is committed to the custody of an agency, department, or institution;

(2) at least every six (6) months for a child of any age who is committed to the custody of an agency, department, or institution but has not been committed for longer than two (2) years;

(3) at least every year for all other children.

(b) ***

(c) ***

(d) ***

## THE DISTRICT OF COLUMBIA YOUTH RESIDENTIAL FACILITIES LICENSURE ACT OF 1986

(Relevant Excerpts)

**§3-802. License requirements**

(a) Except as provided in subsections (b) and (c) of this section, it shall be unlawful to operate a facility in the District, whether public or private, for profit or not for profit, without being licensed by the Mayor. Each facility shall be licensed by both its type and the level(s) of care provided.

(b) Facilities that, before August 13, 1986, were not or would not have been subject to District licensure may operate without a license until 6 months after the issuance of applicable rules under §3-803.

(c) The continued operation of a facility pending action by the Mayor on an application for licensure renewal or initial licensure under subsection (b) of this section shall not be deemed unlawful if a completed application was timely filed but, through no fault of the facility's administrator or adult caregiver(s), the Mayor has failed to act on the application before the expiration of the facility's current license or, under subsection (b) of this section, its authorized period of operation. A facility operating under this subsection shall comply with all other provisions of this chapter and rules issued pursuant to this chapter.

(d) Application forms shall include copies of all certificates of approval, authority, occupancy, or need that are required as a precondition to lawful operation in the District.

(e) A license shall be valid only for the person(s), address, type of facility, and level(s) of care stated on the license.

(f) A license shall, whenever possible, give the Mayor at least 60 days advance written notice before transferring ownership of a facility, including, in the case of a corporate licensee, any transfer of the legal or beneficial ownership of 10% or more of the stock of the corporation. Upon notification, the Mayor may conduct an investigation or require reinspection to ensure that the facility will remain in compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws.

(g) Unless sooner terminated or renewed, a license required by this chapter shall expire 1 year from the date it was issued or last renewed.

(h) A facility shall promptly honor all requests by District government officials, residents, and members of the public to inspect its license. (Aug. 13, 1986, D.C. Law 6-139, §3, 33 DCR 3804.)

**§3-803. Rules**

(a) The Mayor shall, no later than 12 months after August 13, 1986, and pursuant to subchapter I of Chapter 15 of Title 1, issue all rules necessary to carry out the purposes of this chapter. These rules may categorize and define the various types of facilities, may establish licensure fees, and shall at a minimum include:

(1) Procedures governing the issuance, renewal, conversion, suspension, and revocation of licenses, the orderly transfer and discharge of residents, the receipt and investigation of complaints or allegations of abuse, the issuance of variances, and appeals from licensure-related decisions;

(2) A statement of residents' rights and responsibili-

ties for each type of facility;

(3) Standards for continuing care, emergency care, therapeutic care, and aftercare; and

(4) Standards for each type of facility, including (when applicable), but not necessarily limited to:

(A) Programmatic standards with respect to educational, rehabilitative, and mental health services, recreational activities, parental and family involvement, the use of discipline and restraint, and the prevention of abuse;

(B) Personnel and staffing standards with respect to the ratio of staff to residents, caregiver qualifications, and ongoing staff and volunteer training;

(C) Personal care standards with respect to resident nutrition, hygiene, and emergency and routine health care;

(D) Confidentiality and privacy standards with respect to a resident's person, property, living quarters, case records, and subjection to searches for contraband;

(E) Safety and sanitation standards with respect to all parts of the facility and grounds, fire protection and prevention, first aid, and the facility's electrical, heating, cooling, ventilation, and water systems;

(F) Environmental, structural, and architectural standards; and

(G) Administrative standards with respect to resident admissions and discharges, operating procedures, fiscal management, complaint investigation and review, quality assurance, recordkeeping, and reporting.

(b) The standards adopted under subsection (a)(4)(A) of this section shall reflect a strong presumption that parental and family contact is in a resident's best interest and that active parental and family involvement is essential to a resident's care.

(c) The Mayor shall ensure that, no later than 6 months after the issuance of rules under subsection (a) of this section, all facilities shall be licensed in accordance with those rules.

(d) No later than 30 days after August 13, 1986, the Mayor shall appoint an advisory task force composed of social service, mental health, and education professionals, child welfare advocates, facility providers, community representatives, and representatives from relevant District government agencies. Within a time frame established by the Mayor, this task force shall formulate and present to the Mayor detailed, proposed standards for the rules required by subsection (a)(2) through (4) of this section. The Mayor shall give substantial weight to the task force's recommendations and shall, on a regular basis before publication of proposed rules, maintain a formal, structured dialogue with task force representatives while reviewing and acting on those recommendations.

(e)(1) The Mayor may, upon a showing of extreme hardship and manifest public need and if not inconsistent with other provisions of this chapter or deleterious to resident health, safety, or welfare, grant variances to private facilities with respect to the standards established under subsection (a)(3) and (4) of this section. The Mayor shall maintain a public record listing all variances granted under this subsection and containing a complete written explanation of the basis for each variance.

(2) The Mayor shall not issue variances to facilities owned or operated by the District government. (Aug. 13, 1986, D.C. Law 6-139, §4, 33 DCR 3804.)

**§3-805. Inspections**

(a) (1) To ensure that each new facility will be in compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws, the Mayor shall conduct an on-site inspection before a facility's initial licensure. Instead of issuing a full-year license to a new facility or licensee, the Mayor may issue a provisional license under §3-807(b) pending satisfactory completion of additional, follow-up inspections. After initial licensure, the Mayor shall conduct at least 1 on-site inspection before each licensure renewal.

(2) The Mayor shall at least once a year inspect all facilities caring for District children outside the District to ensure that each of these facilities is in substantial compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws. One year after the issuance of rules under §3-803, the Mayor shall report to the Council on the cost and efficacy of implementing this paragraph and on the extent to which facilities caring for District children outside the District are required by their respective jurisdictions to meet licensure standards comparable to those adopted under §3-803. Within 45 days after receiving the Mayor's report, the Council shall determine whether this paragraph should be amended to authorize the Mayor to accept licensure by other jurisdictions in lieu of conducting annual inspections.

(b) The Mayor may at any reasonable hour enter a facility for the purpose of conducting an announced or unannounced inspection to check for compliance with this chapter, a rule issued pursuant to this chapter, or any other District or locally enforceable federal law. When conducting an inspection, especially of a foster home, the Mayor shall respect the homelike atmosphere of the facility and the reasonable privacy interests of its residents and adult caregivers.

(c) Any District government employee who, while visiting a facility for the purpose of casework or monitoring, observes a condition that he or she believes in violation of this chapter, a rule issued pursuant to this chapter, or any other district or federal law shall, no later than 7 days after making the observation and if not previously reported, report this suspected violation to the Department of Consumer and Regulatory Affairs ("DCRA").

(d) The Mayor shall make all licensure and inspection reports available to the public upon request and shall notify all child-placing agencies in the District whenever a facility's license is suspended, revoked, converted to a provisional or restricted license, or not renewed. (Aug. 13, 1986, D.C. Law 6-139, §6, 33 DCR 3804.)